Supreme Court, U.S.
FILED
FEB 22 1999

No. 98-149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

COLLEGE SAVINGS BANK,

Petitioner,

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Respondent.

On Writ of Certiorari to the United State Court of Appeals for the Third Circuit

JOINT APPENDIX

WILLIAM B. MALLIN
Counsel of Record
LEWIS F. GOULD, JR.
JOSEPH M. RAMIREZ
ECKERT SEAMANS CHERIN & MELLOTT, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-6000

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
Office of the Attorney General
The Capitol
Tallahassee. FL 32399-1050
(850) 414-3300

Counsel for Respondent

DAVID TODD
Counsel of Record
DEBORAH M. LODGE
PATTON BOGGS LLP
2550 M Street, NW
Washington, DC 20037
(202) 457-6000

ARNOLD B. CALMANN
SAIBER SCHLESINGER SATZ & GOLDSTEIN, LLC
One Gateway Center
Newark, NJ 07102-5311
(973) 622-3333

Counsel for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

PETITION FOR CERTIORARI FILED JULY 17, 1998
CERTIORARI GRANTED JANUARY 8, 1999

10PP

TABLE OF CONTENTS

Docket Entries in the U.S. District Court for the District of New Jersey 1

Docket Entries in the U.S. Court of Appeals for the Third Circuit 7

Complaint of College Savings Bank filed in the U.S. District Court for the District of New Jersey 13

Answer, Affirmative Defenses and Counterclaim of Defendant Florida Prepaid Postsecondary Education Expense Board 25

Florida Statutes § 240.551 45

The decisions of the courts below are contained in the Appendix to College Savings Bank's Petition for a Writ of Certiorari.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 131 F.3d 353 (3d Cir. 1997), *cert. granted*, 67 U.S.L.W. 3433 ..... Pet. App. A

College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 948 F. Supp. 400 (D.N.J 1996) ..... Pet. App. B

U.S. DISTRICT COURT FOR THE DIST. OF NEW JERSEY

Docket as of May 7, 1997 9:35 am

Proceedings include all events. 12BH SCHEDO APPEAL

3:95cv4516 COLLEGE SAVINGS BANK v. FLORIDA PREPAID POST

8/25/95—1—COMPLAINT filed $120.00 RECEIPT #211359 (MS) [Entry date 09/01/95] [Edit date 09/08/95]

9/1/95—2—NOTICE of Allocation and Assignment filed. Magistrate Hughes (Trenton-Brown) (MS)

9/12/95—3—RETURN OF SERVICE executed as to FLORIDA PREPAID POST 8/30/95. Answer due on 9/19/95. (eh) [Entry date 09/14/95]

9/14/95—4—APPLICATION by FLORIDA PREPAID POST and Clerk's Order extending time to answer. Answer due 10/4/95 for FLORIDA PREPAID POST (CC)

10/2/95—5—NOTICE of change of firm by counsel for COLLEGE SAVINGS BANK (eh) [Entry date 10/05/95]

10/12/95—6—STIPULATION and ORDER, resetting answer due for 11/3/95 for FLORIDA PREPAID POST. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh) [Entry date 10/13/95]

11/3/95—9—Notice of MOTION for WILLIAM B. MALLIN & LEWIS F. GOULD, JR. to appear pro hac vice by FLORIDA PREPAID POST, Motion hearing set for 10:00 12/4/95 on motion. (PO Subm) (eh) [Entry date 11/09/95]

11/8/95—7—Substitute attorney for FLORIDA PREPAID POST ; Terminated attorney ROBERT G. SHEPHERD; Added, ANNE E. HENDRICKS (eh) [Entry date 11/09/95]

11/8/95—8—ANSWER to Complaint and COUNTERCLAIM by FLORIDA PREPAID POST against COLLEGE SAVINGS BANK (eh) [Entry date 11/09/95]

11/22/95—11—APPLICATION by COLLEGE SAVINGS BANK and Clerk's Order extending time to answer dft's counterclaim to 12/12/95. (eh) [Entry date 12/04/95]

11/29/95—10—ORDER granting [9-1] motion for WILLIAM B. MALLIN & LEWIS F. GOULD, JR. to appear pro hac vice. (signed by Magistrate John J. Hughes) (NM) (eh) [Entry date 12/01/95]

12/5/95—12—Minute entry: Proceedings NOT recorded; Minutes of 12/5/95; ACTION GRANTED: [9-1] motion for WILLIAM B. MALLIN & LEWIS F. GOULD JR. to pro hac vice (By Magistrate John J. Hughes) (ms) [Entry date 12/07/95]

12/13/95—13—Notice of Intent to submit a Dispositive motion to dismiss counterclaim by COLLEGE SAVINGS BANK. (eh)

12/22/95—14—DEMAND for jury trial by FLORIDA PREPAID POST (eh) [Entry date 12/28/95]

1/11/96—-—-—Scheduling conference held before Magistrate John J. Hughes on 1/11/96. (eh) [Entry date 01/30/96]

1/24/96—15—ORDER, for DAVID C. TODD to appear pro hac vice for pltf. (signed by Magistrate John J. Hughes) (NM) (eh)

1/24/96—16—ORDER, for GARRET G. RASMUSSEN to appear pro hac vice for pltf. (signed by Magistrate John J. Hughes) (NM) (eh)

1/24/96—17—ORDER, for DEBORAH M. LODGE to appear pro hac vice for pltf. (signed by Magistrate John J. Hughes) (NM) (eh)

1/30/96—18—SCHEDULING ORDER setting Discovery cutoff 7/31/96; Joining of Parties & Amending of pleadings on 5/10/96; Status conference 2:00 3/6/96, 6/26/96 & 10/30/96; and setting schedule for service of certain reports. (signed by Magistrate John J. Hughes) (NM) (eh)

2/5/96—19—Copy of ORDER reassigning matter from Judge Brown to Judge Orlofsky and reallocating matter from Trenton to Camden. (signed by Chief Judge Anne E. Thompson) (NM) (eh) [Entry date 02/06/96]

2/9/96—20—Notice of MOTION to dismiss counterclaims by COLLEGE SAVINGS BANK, Motion hearing set for 9:30 3/15/96 on [20-1] motion . (Brief/PO Subm) (jf) [Entry date 02/15/96]

2/21/96—21—ORDER reassigning matter from Judge Orlofsky to Judge Brown and reallocating matter from Camden to Trenton. (Signed by Chief Judge Anne E. Thompson) (NM) (eh) [Entry date 03/01/96]

3/4/96—22—Minute entry: Proceedings recorded by ESR: CAROTHERS; Minutes of: 3/4/96; The following actions were taken under advisement: [20-1] motion to dismiss counterclaims. By Judge Garrett E. Brown, Jr. (eh) [Entry date 03/11/96]

3/22/96—23—MEMORANDUM OPINION. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh)

3/22/96—24—ORDER granting [20-1] motion to dismiss Counterclaims I, II & III. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh)

3/29/96—25—STIPULATION and PROTECTIVE ORDER, directing certain materials be filed as confidential. (signed by Mag. Judge John J. Hughes) (NM) (eh)

4/26/96—26—Notice of Intent to submit a Dispositive motion by FLORIDA PREPAID POST (MB) [Entry date 04/30/96]

5/3/96—27—Notice of MOTION to dismiss for lack of jurisdiction by FLORIDA PREPAID. Motion hearing set for 10:00 6/10/96 on [27-1] motion. (Brief/PO Subm) (PER CHAMBERS) (eh) [Entry date 05/06/96]

5/15/96—28—ORDER cancelling all case management deadlines; staying case pending resolution of motions to dismiss; and continuing protective order under certain conditions. (signed by Mag. Judge John J. Hughes) (NM) (ms) [Entry date 05/16/96]

5/17/96—29—DECLARATION of DEBORAH M. LODGE on behalf of COLLEGE SAVINGS BANK in opposition RE: [27-1] motion to dismiss for lack of jurisdiction. (eh) [Entry date 05/20/96]

5/20/96—30—TRANSCRIPT of pre-trial hearing taken on 3/4/96. (eh)

8/2/96—31—ORDER, adding USA as an Intervenor; and setting briefing schedule. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh) [Entry date 08/05/96]

11/4/96—32—Minute entry: Proceedings recorded by Ct-Reporter: Carothers/ESR; Minutes of: 11//4/96; The following actions were taken, [27-1] motion to dismiss for lack of jurisdiction. DECISION RE-

SERVED. By Judge Garrett E. Brown, Jr. (CC) [Entry date 11/13/96]

12/16/96—33—MEMORANDUM OPINION. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh)

12/16/96—34—ORDER granting [27-1] motion to dismiss for lack of jurisdiction; dismissing complaint in its entirety; and in CV94-5610: denying dft's motion to dismiss. (signed by Judge Garrett E. Brown, Jr.) (NM) (eh)

12/16/96———Case closed (eh)

1/27/97—35—NOTICE OF APPEAL filed at 9:15 AM by COLLEGE SAVINGS BANK Re: [34-1] order, [33-1] order . Fee Status: PAID $105.00 RECEIPT #230138. Copies of notice of appeal sent to USCA and Attorney(s): ARNOLD B. CALMANN, ROBERT G. SHEPHERD, ANNE E. HENDRICKS, W. SCOTT SIMPSON (MS) [Entry date 01/29/97]

2/5/97—36—NOTICE of Docketing ROA from USCA Re: [35-1] appeal USCA NUMBER: 97-5055 (MS) [Entry date 02/07/97]

2/11/97—37—NOTICE OF APPEAL filed at 9:25 AM by USA Re: [34-1] order, [33-1] order . Fee Status: waived. Copies of notice of appeal sent to USCA and Attorney(s): ARNOLD B. CALMANN, ROBERT G. SHEPHERD, ANNE E. HENDRICKS, W. SCOTT SIMPSON (MS) [Entry date 02/13/97]

2/19/97—38—Transcript Purchase Order RE: [35-1] appeal None requested. (MS) [entry date 02/20/97]

2/20/97———Record complete for purposes of appeal. (MS)

3/4/97—39—NOTICE of Docketing ROA from USCA Re: [37-1] appeal USCA NUMBER: 97-5086 (MS) [Entry date 03/07/97]

3/17/97—40—Transcript Purchase Order RE: [37-1] appeal None requested. (MS) [Entry date 03/24/97]

3/24/97———Record complete for purposes of appeal. (MS)

U.S. COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket as of February 2, 1999 8:51 am

Proceedings include all events. ARGUED ctc CLOSED

97-5055 COLLEGE SAVINGS BANK v.
FL PREPAID

1/31/97—CIVIL CASE DOCKETED. Notice filed by College Savings Bank. (ddw) [97-5055]

2/6/97—APPEARANCE from Attorney Anne E. Hendricks on behalf of Appellee FL Prepaid, filed. (ddw) [97-5055]

2/7/97—APPEARANCE from Attorney Joseph M. Ramirez and William B. Mallin on behalf of Appellee FL Prepaid, filed. (ddw) [97-5055]

2/10/97—APPEARANCE from Attorney David C. Todd on behalf of Appellant College Savings Bank, filed. (ddw) [97-5055]

2/10/97—DISCLOSURE STATEMENT on behalf of Appellant College Savings Bank, filed. (ddw) [97-5055]

2/10/97—INFORMATION STATEMENT on behalf of Appellant College Savings Bank, received. (ddw) [97-5055]

2/10/97—STATEMENT OF FACTS AND ISSUES on behalf of Appellant College Savings Bank, received. (ddw) [97-5055]

2/10/97—TRANSCRIPT PURCHASE ORDER (PART I), no proccedings in District Court. (ddw) [97-5055]

2/24/97—APPEARANCE from Attorney Michael E. Robinson and Mark B. Stern on behalf of Appellee USA, filed. (ddw) [97-5055]

3/13/97—APPEARANCE from Attorney Arnold B. Calmann on behalf of Appellant College Savings Bank, filed. (lac) [97-5055]

4/2/97—CERTIFIED LIST filed. (ddw) [97-5055]

4/2/97—BRIEFING NOTICE ISSUED. Appellant's brief and appendix due 5/12/97. **VACATED** per Clerk's order of 4/11/97. (ddw) [97-5055]

4/9/97—MOTION filed by appellant College Savings Bank in 97-5055 to consolidate Nos. 97-5055 and 97-5086 for briefing and disposition. Answer due 4/18/97. Certificate of Service dated 4/8/97. (ddw) [97-5055]

4/11/97—ORDER (Clerk) granting motion by appellant College Savings Bank to consolidate appeals for briefing and disposition. The appeals at 97-5055 and 97-5086 are consolidated for the purposes of disposition and filing a joint appendix. The briefing schedule in 97-5055 is vacated. A consolidated briefing schedule shall issue. The parties are encouraged to coordinate and join in briefs to avoid any unnecessary duplication. Appellee may file a single consolidated brief in response to appellant's brief(s) within 30 days from the date that the last appellant's brief is filed, filed. (ddw) [97-5055]

4/18/97—BRIEFING NOTICE ISSUED. Appellant's brief and appendix due 5/28/97 in 97-5055 and 97-5086. (ddw) [97-5055 97-5086]

5/28/97—Letter by appellant College Savings Bank treated as a motion for extension of time to file brief and appendix, with service, fiiled. (ddw) [97-5055]

5/28/97—BRIEF on behalf of appellant College Savings Bank, Pages: 41, Copies: 10, delivered by mail, filed. Certificate of service date 5/28/97. (ddw) [97-5055]

5/28/97—APPENDIX on behalf of Appellant College Savings Bank in 97-5055, Appellant USA in 97-5086, Copies: 4, Volumes: 1, Delivered by mail, filed. Certificate of service date 5/28/97. (ddw) [97-5055 97-5086]

6/2/97—ORDER (Clerk) granting motion by appellant USA for extension of time to file brief and appendix. In light of the fact that the above listed appeals are consolidated for the purposes of a consolidated briefing schedule, the filing of a joint appendix and for disposition, appellants' briefs and joint appendix in 97-5055 & 97-5086 shall be filed and served on or before 6/4/97. It is noted that appellant requests an extension of time for appellee. Such request may only be made by appellee and only after such time all appellants' briefs are filed and served, filed. (ddw) [97-5086]

6/2/97—ORDER (Clerk) denying as unnecessary the motion by appellant for extension of time to file brief and appendix as appellant's, College Savings Bank, brief was timely filed, filed. (ddw) [97-5055]

6/30/97—BRIEF on behalf of Appellee FL Prepaid in 97-5055/5086, Pages: 40, Copies: 10, delivered by mail, filed. Certificate of Service date 6/30/97. (tap) [97-5055 97-5086]

7/11/97—MOTION filed by Regents of Univ CA for leave to file brief as amicus curiae in support of appellee and for leave to file brief out of time. Answer due 7/21/97. Certificate of Service dated 7/10/97. (ddw) [97-5055 97-5086]

7/14/97—RESPONSE filed by Appellant College Savings Bank in opposition to motion by Regents of Univ CA for leave to file brief as amicus curiae and for leave to file brief out of time. Certificate of service dated 7/11/97. (ddw) [97-5055]

7/14/97—MOTION filed by Appellant College savings Bank for extension of time to file reply brief. Answer due 7/21/97. Certificate of Service dated 7/11/97. (ddw) [97-5055]

7/21/97—ORDER (Clerk) granting motion by appellant for extension of time to file reply brief. Appellant's reply brief shall be filed and served within 14 days from the date of the order either denying or granting proposed amicus leave to file an amicus brief out of time, filed. (ddw) [97-5055]

8/1/97—ORDER (Mansmann, Circuit Judge) granting motion by proposed amicus Regents of Univ CA for leave to file brief as amicus curiae and for leave to file brief out of time. The Clerk shall give the appellants an extension, if necessary to file their reply briefs, filed. C-2 (ddw) [97-5055 97-5086]

8/1/97—AMICUS BRIEF on behalf of Regents of Univ CA. Pages: 22, Delivered by mail, filed. Certificate of service date 7/10/97. (ddw) [97-5055 97-5086]

8/7/97—CALENDARED for Monday, October 20, 1997. (rr) [97-5055 97-5086]

8/14/97—APPEARANCE from Attorney Gerald P. Dodson on behalf of Amicus-appellee Regents of Univ CA, filed. (ddw) [97-5055]

8/14/97—DISCLOSURE STATEMENT on behalf of Amicus-appellee Regents of Univ CA, filed. (ddw) [97-5055 97-5086]

8/15/97—REPLY BRIEF on behalf of Appellant College Savings Bank, Copies: 10, Delivered by mail, filed. Certificate of service date 8/15/97. (ddw) [97-5055]

10/20/97—ARGUED 10/20/97 Panel: Mansmann, Greenberg and Alarcon, Circuit Judges. (rr) [97-5055 97-5086]

12/5/97—PUBLISHED OPINION (Mansmann, Greenberg, Authoring Judge, *Alarcon, Circuit Judges), filed. *United States Circuit Judge for the Ninth Circuit sitting by designation. (mmb) [97-5055 97-5086]

12/5/97—JUDGMENT: AFFIRMED, costs taxed against appellants, filed. (mmb) [97-5055 97-5086]

12/15/97—BILL OF COSTS by Appellee FL Prepaid. Certificate of service dated 12/10/97, filed. (clc) [97-5055]

1/15/98—MOTION filed by Appellant College Savings Bank and USA in 97-5055 and 97-5086 to extend time to file petition for rehearing en banc until 2/3/98. Answer due 1/23/98. Certificate of Service dated 1/13/98. (ctc) [97-5055 97-5086]

1/15/98—RESPONSE filed by Appellee FL Prepaid in 97-5055 and 97-5086 in opposition to motion to extend time to file petition for rehearing en banc. Certificate of service dated 1/14/98. (ctc) [97-5055 97-5086]

1/21/98—ORDER (Clerk) considering motion by Appellants and response by Appellee to extend time to file petition for rehearing en banc by appellant College Bank, and USA in 97-5055 and 97-5086. Any petition for rehearing shall be filed and served on or before February 3, 1998, filed. (ctc) [97-5055 97-5086]

2/3/98—PETITION by Appellant College Savings Bank in 97-5055 for rehearing in banc. Certificate of service dated 2/2/98, filed. (ctc) [97-5055 97-5086]

2/17/98—ORDER (Becker, Chief Judge, Sloviter, Stapleton, Mansmann, Greenberg, Authoring Judge, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, McKee, Rendell, Alarcon*, Circuit Judges) denying petition for in banc rehearing by Appellant College Savings Bank. *Honoralbe Arthur L. Alarcon, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation. Judge Alarcon's vote is limited to the application before the original panel. (ctc) [97-5055 97-5086]

2/25/98—MANDATE ISSUED, filed. (97-5086) (ctc) [97-5055 97-5086]

2/25/98—RECORD released. (ctc) [97-5055]

5/15/98—U.S. Supreme Court letter dated 5/11/98 extending time to file petition for writ of certiorari until and including June 17, 1998, filed . (ctc) [97-5055 97-5086]

7/31/98—Supreme Court of U.S. notice filed advising petition for writ of certiorari filed in the Supreme Court on 7/17/98 at Supreme Ct. case number: 98-149. (ctc) [97-5055 97-5086]

1/19/99—U.S. Supreme Court order dated 1/8/99 at S.C. number: 98-149, granting petition for writ of certiorari in 97-5055 and 97-5086, filed. (ctc) [97-5055 97-5086]

CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(201) 596-4500
AC 3245

PATTON BOGGS, L.L.P.
2550 M. Street, N.W.
Washington, D.C. 20037
(202) 457-6000
DT 3250

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 95-4516 (GEB)

COLLEGE SAVINGS BANK,

Plaintiff,

vs.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Defendant.

COMPLAINT

Plaintiff College Savings Bank, through its attorneys, for its Complaint against Florida Prepaid Post Secondary Education Expense Board (''Florida Prepaid''), relating to violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and New Jersey common law, avers as follows:

Nature of Claim

1. This action for false advertising and unfair competition arises under the trademark laws of the United States, 15 U.S.C. §§ 1051 *et seq.*, and the common law of unfair competition, and concerns material misrepresentations made in connection with the advertising and promotion of the Florida Prepaid College Program. Florida prepaid has claimed, specifically or by implication, that under its program college tuitions are guaranteed by the State of Florida when they are not; that the Internal Revenue Service (''IRS'') has ruled that the Florida Prepaid College Program qualifies for advantageous tax treatment when no such ruling has been made; that the Florida Prepaid College Program's investments are backed by the ''Full Faith and Credit'' of the United States when they are not; and Florida Prepaid has failed to disclose material information about the Florida Prepaid College Program.

Jurisdiction and Venue

2. This court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1131, 1137(a) and 1338(a), 15 U.S.C. § 1121 (a), and the doctrines of ancillary and pendent jurisdiction.

3. The remedies sought in this action are authorized by Rules 57 and 65 of the Federal Rules of Civil Procedure, the Declaratory Judgments Act, 28 U.S.C. §§ 2201 *et seq.*, and the trademark laws of the United States, 15 U.S.C. §§ 1051 *et seq*.

4. Venue is proper in this district under 28 U.S.C. § 1391 (b) and (c).

The Parties and Related Action

5. Plaintiff College Savings Bank is a New Jersey chartered savings bank, with its principal place of business at 5 Vaughn Drive, Princeton, New Jersey 08540.

6. Upon information and belief, Defendant Florida Prepaid is a body corporate of the State of Florida, with its principal place of business at 345 South Magnolia Drive, Tallahassee, Florida 32301, is transacting and doing business in the State of New Jersey, and is deemed to reside here.

7. There is already pending in this District a patent infringement lawsuit between the parties. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*. Civ. Action No. 94-5610 (GEB) (D.N.J.). In that action, Plaintiff Colleges Savings Bank is claiming that Florida Prepaid has infringed Plaintiff's U.S. Patent No. 4,722,055, and is seeking injunctive relief as well as trebled monetary damages for willful infringement.

Background

8. Since September 1987, College Savings Bank has engaged in the business of selling its CollegeSure® C.D., a deposit contract administered in accordance with a patented method to provide a return adequate to meet payouts for funding the uncertain cost of a college education at a future date.

9. Since September 1988, Florida Prepaid has been administering and promoting a tuition prepayment program (the ''Florida Prepaid College Program'' or the ''Program''), pursuant to which consumers are offered contracts administered in accordance with a method to provide a return adequate to meet payouts for funding the uncertain cost of a college education at a future date. Consumers can choose contracts for various tuition benefits, ranging from two years at a community college, to four years at a state university, and up to five years of dormitory expenses. Consumers can elect to make the contractual payments in a single lump sum or in installments. Upon information and

belief, since its inception, Florida Prepaid has sold over 327,000 such contracts, including sales to a number of residents of New Jersey.

10. The Florida Prepaid College Program is extensively advertised and promoted by means of brochures and other promotional materials, including press releases and other written materials distributed by Florida Prepaid.

11. Defendant Florida Prepaid currently competes with Plaintiff College Savings Bank in connection with the sale of contracts and savings vehicles designed to help consumers save for college educations. College Savings Bank's efforts to sell competing contracts have been impaired by false and misleading claims that Florida Prepaid has made in its promotional materials.

12. Upon information and belief, these false and misleading promotional materials were intended to, and have had the effect of, causing consumers to participate in the Florida Prepaid College Program who would not otherwise have done so, harming both the consumers and College Savings Bank.

COUNT 1

Defendant's Representations That Tuition is "Guaranteed by the State of Florida" Are False and Violate Section 43(a) of the Lanham Act.

13. Plaintiff repeats and realleges each and every allegation of Paragraphs 1 through 12 hereof as if said paragraphs were set forth in full herein.

14. Florida Prepaid's marketing materials have falsely represented that the State of Florida "guarantees" that the beneficiary of each contract purchased pursuant to the Florida Prepaid College Program will be entitled to have his or her full college tuition paid at a participating college or university. In fact, Florida's guarantee is limited only to

beneficiaries who are enrolled in or are within five years of starting college. For all others, Florida can cancel the contract at any time and is obligated only to return the money invested and interest calculated at a passbook rate.

15. Among the false and misleading statements that Florida Prepaid has made with respect to its claimed "guarantee" are the following unqualified representations:

a. "The state of Florida financially guarantees the Florida Prepaid College Program. This allows you to rest assured the contracted tuition fees, and optional dormitory fees, will be paid at the time your children are ready to enroll in college." (1994 Marketing Brochure, facing p. 1). *See* Exhibit 1 hereto (1994 Marketing Brochure).

b. "The program is financially guaranteed by the state of Florida, so you have peace of mind that your contracted tuition or optional dormitory fees will be paid at the time of your beneficiary's college enrollment, no matter what those fees will be." (1993 Marketing Brochure, facing p. 1). *See* Exhibit 2 hereto (relevant portions of the 1995 Marketing Brochure).

c. "The best part of the Florida Prepaid College Program is that tuition for a college education is financially guaranteed by the state of Florida." (1994 Marketing Brochure, p. 5). *See* Exhibit 1.

d. "The state of Florida financially guarantees payment of the contracted state tuition and dormitory fees at the time of college enrollment." (January 11, 1994 release entitled "Prepaid College Program Enrollment Period Ends Jan. 14"). *See* Exhibit 3 hereto (text of January 11, 1994 release).

16. The State of Florida's obligation is in fact limited to beneficiaries who are enrolled in, or are within five years of

enrollment in, a college or other secondary education institution. Contract purchasers for younger beneficiaries are entitled only to a refund of their payment, with interest at a passbook savings rate. Although the limited scope of the "guarantee" is disclosed in the fine print of the "Master Covenant" which the consumer receives only after filling out an application and paying a non-refundable application fee, that subsequent disclosure does not cure the misleading representations made in the marketing brochures and other promotional materials.

17. Florida Prepaid's misrepresentations with respect to Florida's guarantee are material, as Florida Prepaid is well aware. According to William Montjoy, the Executive Director of the Florida Prepaid College Program, "The guarantee is the prime reason we've had success and acceptability." J. Kenyon, "Banking on College", *The Tampa Tribune*, 11/6/94, at 1, 8.

18. Upon information and belief, the majority of beneficiaries of Florida Prepaid College Program do not fall within Florida's guarantee and are at risk of not being able to have their college tuitions paid under the Program.

19. Florida Prepaid's false and misleading statements regarding its "guarantee" constitute misrepresentations as to the nature, characteristics and/or qualities of Florida Prepaid's goods or services in connection with its commercial activities, all in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

20. Plaintiff has been, and will continue to be, severely and irreparably damaged due to Florida's Prepaid's conduct complained of herein.

COUNT II

Florida Prepaid's False Statements With Respect to the Tax Consequences of the Program Violate Section 43(a) of the Lanham Act.

21. Plaintiff repeats and realleges each and every allegation of Paragraphs 1 through 20 hereof as if said paragraphs were set forth in full herein.

22. Among the claims, specific or implied, used by Florida Prepaid to promote the Program is that the IRS has specifically ruled that any tax liability flowing from a Program contract is the liability of the student beneficiary, and that the liability will be deferred until the student receives the benefits under the contract, *i.e.*, when the student is enrolled in college. For example, the 1994 Marketing Brochure falsely states:

> Under 1988 IRS rulings, any tax liability is deferred until the student enters college. At that time, the difference between the amount paid in and the value of the benefits received is taxable to the student over his college years. . . . As with all tax rulings, this is subject to change based on future congressional legislation." (Questions and Answers About the Florida Prepaid College Program, 1994 Marketing Brochure, pp. 12-13, Exhibit 1 hereto).

23. In fact, the IRS has never issued a tax ruling on the Florida Prepaid College Program. Although in 1990, Florida Prepaid sought a letter ruling from the IRS that income earned by Florida Prepaid is exempt from tax (a ruling which has not yet been issued), Florida Prepaid has never sought a tax letter ruling on the tax consequences to individual taxpayers.

24. There is a substantial risk that the tax liability will fall on the purchase, not the beneficiary. Florida Prepaid has

never disclosed this material risk, or that fact that the purchaser generally is in a much higher tax bracket, in its marketing brochures or other promotional materials. Although Florida Prepaid discloses, in the fine print of the "Master Covenant", the possibility that the purchaser will be subject to tax, such subsequent disclosure does not cure the omissions in the marketing brochures and other promotional materials.

25. There is also a substantial risk that the purchaser or the beneficiary will have to pay annual taxes on imputed income. Florida Prepaid has failed to disclose this fact in its marketing brochures, or in any other material.

26. Despite substantial uncertainty about the tax consequences to consumers of the Florida Prepaid College Program, Florida Prepaid has failed even to advise potential purchasers to seek advice from their tax advisors.

27. Florida Prepaid's false and misleading statements regarding IRS rulings regarding the tax treatment of the program constitute misrepresentations as to the nature, characteristics and/or qualities of Florida Prepaid's goods or services in connection with its commercial activities, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

28. Plaintiff has been, and will continue to be, severely and irreparably damaged due to Florida Prepaid's conduct complained of herein.

COUNT III

Florida Prepaid's Representations Regarding Investments Backed by the "Full Faith and Credit" of the United States Violate Section 43(a) of the Lanham Act.

29. Plaintiff repeats and realleges each and every allegation of Paragraphs 1 through 28 hereof as if said paragraphs were set forth in full herein.

30. Florida Prepaid has falsely represented the Program's assets are invested only in U.S. Government debt and are backed by the "Full Faith and Credit" of the Federal government with no risk of default. (1994 Annual Report, pp. 2, 8). *See* Exhibit 4 hereto (relevant portions of the 1994 Annual Report).

31. By means of the foregoing statement and other statements, Florida Prepaid has falsely implied that the Florida Prepaid College Program is free of credit risk.

32. Such representations are materially false and misleading. A significant amount of the assets of Florida Prepaid are invested in Resolution Funding Corporation Strips, which are not obligations of or backed by the "Full Faith and Credit" of the United States Government, nor are they obligations of the Resolution Trust Corporation. The investments made by Florida Prepaid are not free of credit risk.

33. The foregoing false and misleading statements constitute material misrepresentations as to the nature, characteristics and/or qualities of Florida Prepaid's goods or services in connection with its commercial activities, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

34. Plaintiff has been, and will continue to be, severely and irreparably damaged due to Florida Prepaid's conduct complained of herein.

COUNT IV

Florida Prepaid's Failure to Disclose the Existence of Patent Infringement Lawsuit Constitutes a Violation of Section 43(a) of the Lanham Act.

35. Plaintiff repeats and realleges each and every allegation of Paragraphs 1 through 34 hereof as if said paragraphs were set forth in full herein.

36. On November 7, 1994, Plaintiff commenced an action against Defendant Florida Prepaid, claiming that Florida Prepaid has infringed Plaintiff's U.S. Patent No. 4,722,055. In that action, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Civ. Action No. 94-5610 (GEB) (D.N.J.), Plaintiff is seeking a permanent injunction prohibiting any further use of patented inventions that are vital to the current operations of Florida Prepaid, together with trebled monetary damages, for willful and deliberate patent infringement.

37. Pursuant to statute, each year Florida Prepaid must prepare an annual report "setting forth in appropriate detail an accounting of the fund and a description of the financial condition of the program at the close of each fiscal year." Fla. Stat. Ann. § 240.551(g). That statute also requires Florida Prepaid to make the annual report available to purchasers of advance payment contracts.

38. The 1995 Annual Report of Florida Prepaid, which was published on or after March 31, 1995—well after the date of the filing and service of the above-referenced patent infringement lawsuit against Florida Prepaid, fails to disclose the patent infringement litigation as a material pending or threatened litigation, or as a potentially material loss contingency, or even as an unasserted claim.

39. In view of the materially adverse impact that an unfavorable outcome in the patent infringement litigation could have on Florida Prepaid, the failure to disclose in the Annual Report the existence of the litigation and its possible impact on Florida Prepaid amounts to a false and misleading representation as to the nature, characteristics and/or qualities of Florida Prepaid's goods or services in connection with its commercial activities, in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

40. Plaintiff has been and will continue to be, severely and irreparably damaged due to Florida's Prepaid's conduct complained of herein.

COUNT V

Florida Prepaid Has Violated The Common Law of Unfair Competition.

41. Plaintiff repeats and realleges each and every allegation of Paragraphs 1-40 hereof as if said paragraphs were set forth in full herein.

42. The misstatements and misrepresentations described above violate the New Jersey common law of unfair competition, to the damage and detriment of Plaintiff College Savings Bank.

WHEREFORE, Plaintiff College Savings Bank prays that the Court enter a judgment:

A. Preliminary and permanently enjoining Florida Prepaid and its directors, officers, employees, attorneys, agents and all persons in active concert or participation with any of them, from further misrepresenting the nature, characteristics and quality of the Program;

B. Declaring that Defendant has violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and has engaged in unfair competition under the common law.

C. Awarding to College Savings Bank damages and profits, pursuant to Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a), and the common law;

D. Trebling the damages awarded to College Savings Bank, pursuant to Section 35(a) of the Lanham Act, 15 U.S.C. § 1117(a);

E. Awarding to College Savings Bank its costs and disbursements, including attorneys' fees; and

F. Awarding to College Savings Bank such other and further relief as this Court may deem warranted.

Date: August 25, 1995 Respectfully submitted,

CRUMMY, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE

By: /s/ Arnold B. Calmann
Arnold B. Calmann

One Riverfront Plaza
Newark, New Jersey 07102
(201) 596-4500

Of Counsel:

David C. Todd
Garret G. Rasmussen
Deborah M. Lodge
PATTON BOGGS, L.L.P.
2550 M Street, N.W.
Washington, DC 20037
(202) 457-6000

Anne E. Hendricks (AEH 1009)
Steven C. Benjamin (SCB 3111)
ECKERT SEAMANS CHERIN & MELLOTT
One Eves Drive
Suite 111
Marlton, New Jersey 08053
(609) 983-7033

Attorneys for Defendant
Florida Prepaid Postsecondary
Education Expense Board

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 95-4516 (GEB)

COLLEGE SAVINGS BANK,

Plaintiff,

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Defendant.

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM OF DEFENDANT FLORIDA PREPAID

Defendant, Florida Prepaid Postsecondary Education Expense Board (''Florida Prepaid''), answers the Complaint of Plaintiff, College Savings Bank and asserts its affirmative defenses and counterclaims as follows:

ANSWER

Nature of Claim

1. Denies. Florida Prepaid denies that it has made any false statements or any material misrepresentations in connection with the advertising and promotion of the Florida

Prepaid College Program. Florida Prepaid denies Plaintiff's characterization of statements which Florida Prepaid has made in connection with the advertisement and promotion of the Florida Prepaid College Program. To the extent that the allegations contained in this paragraph are conclusions of law, no response is required.

Jurisdiction and Venue

2. Denies. To the extent that the allegations contained in this paragraph state legal conclusions, no responsive pleading is required. Title 28 of the United States Code does not contain any sections "1131" or "1137(a)," and, therefore, Defendant Florida Prepaid denies that jurisdiction is appropriate under these sections. Assuming that Plaintiff intended to assert jurisdiction under 28 U.S.C. §§1131 and 1337(a), as well as 28 U.S.C. §1338(a) and 15 U.S.C. §1121(a), Defendant Florida Prepaid denies that jurisdiction is appropriate under these sections as no viable cause of action under these statutes has been asserted against it. Additionally, the doctrines of ancillary and pendent jurisdiction are inappropriate as Plaintiff has failed to assert any viable federal cause of action.

3. Denies. To the extent that the allegations contained in this paragraph state legal conclusions, no responsive pleading is required. Plaintiff is not entitled to the remedies of Rules 57 and 65 or 28 U.S.C. §§2201 *et seq.*, or 15 U.S.C. §1051 *et seq.*, as Plaintiff has failed to allege a viable cause of action against Defendant Florida Prepaid.

4. Denies. Defendant Florida Prepaid denies that venue is proper in this district under 28 U.S.C. §1391(b) or (c).

The Parties and Related Action

5. Denies. Defendant Florida Prepaid is without knowledge or information sufficient to form a belief as to the truth

of the allegations stated in this paragraph, and, therefore, the allegations are denied and strict proof is demanded at the time of trial.

6. Admits in part, denies in part. Defendant Florida Prepaid admits that it is an agency of the State of Florida pursuant to Section 240.551, Florida Statutes, having a place of business in Tallahassee, Florida. The remaining allegations in this paragraph are denied. To the extent that the allegations contained in this paragraph state legal conclusions, no responsive pleading is required.

7. Admits in part, denies in part. Defendant Florida Prepaid admits that there is a patent infringement suit pending, but denies that there is any merit to the claims which College Savings Bank makes in that action.

Background

8. Denies. Defendant Florida Prepaid is without knowledge or information sufficient to form a belief as to the truth of the allegations stated in this paragraph, and, therefore, the allegations are denied and strict proof is demanded at the time of trial.

9. Admits in part, denies in part. Defendant Florida Prepaid admits that since September 1988, it has been administering and promoting a tuition prepayment program (the "Florida Prepaid College Program"), pursuant to which it offers contracts to purchasers of a program that locks in certain costs of a child's (a child that is a resident of Florida) college education at a fixed price. Defendant Florida Prepaid admits that purchasers can choose contracts that offer (based on a specified number of credit hours): (a) four years at a state university; (b) two years at a community college; or, (c) two years at a community college plus two years at a state university. Additionally, purchasers may purchase dormitory plans which cover up to five years in a

dormitory. Defendant Florida Prepaid also admits that purchasers can elect to make payments in a single lump sum or in installments. Defendant Florida Prepaid admits that it has sold in excess of 327,000 accounts, including sales to a relatively small number of purchasers who are now residents of New Jersey for beneficiaries who are residents of Florida. The remaining allegations contained in this paragraph are denied.

10. Admits in part, denies in part. Defendant Florida Prepaid admits that the Florida Prepaid College Program is advertised and promoted by brochures and press releases which are distributed by Florida Prepaid, in the State of Florida. The remaining allegations contained in this paragraph are denied.

11. Denies. Florida Prepaid's advertisements primarily are directed to Florida residents, as only Florida residents, with limited exceptions, are eligible to be beneficiaries under the Florida Prepaid College Program. Defendant Florida Prepaid denies that College savings Bank's efforts to sell competing contracts have been impaired by any statements which it has made or has not made in its promotional materials. Defendant Florida Prepaid further denies that its promotional materials contain any false or misleading statements.

12. Denies. Defendant Florida Prepaid denies that its promotional materials contain any false or misleading statements, and, that the consumers and/or College Savings Bank has been harmed by any statements contained in its promotional materials.

COUNT I

13. Defendant Florida Prepaid incorporates by reference its answers to paragraphs 1 through 12 as if set forth at length herein.

14. Denies. Defendant Florida Prepaid denies that its marketing materials contain any false or misleading statements. To the contrary, the marketing materials accurately describe the Florida Prepaid College Program. Defendant Florida Prepaid further denies Plaintiff's characterization of the statements made in its marketing materials. The marketing materials are documents which speak for themselves.

15. Denies. Defendant Florida Prepaid denies that it has made any false or misleading statements with respect to the guarantee. The marketing materials, in total, accurately describe the Florida Prepaid College Program. Additionally, Defendant Florida Prepaid specifically denies that the statements quoted by Plaintiff in this paragraph, (a-d), are false, misleading, or "unqualified representations." The marketing materials are documents which speak for themselves.

16. Denies. The State of Florida's obligation is stated in paragraph 5.08 of the Master Covenant, a copy of which is attached hereto as Exhibit A. Defendant Florida Prepaid denies Plaintiff's characterization of this obligation. Additionally, Defendant Florida Prepaid denies that the Master Covenant is only available after a prospective purchaser completes an application and pays the application fee. As stated in the 1994 Marketing Brochure, which is attached to Plaintiff's Complaint as Exhibit 1, copies of the Master Covenant are available for review at any First Union National Bank. Defendant Florida Prepaid further denies that the description of the State of Florida's obligation contained in paragraph 5.08 of the Master Covenant is a "subsequent disclosure" which "does not cure the misleading representations made in the marketing brochures and other promotional materials." The statements in the marketing brochures and any other promotional materials are neither false nor mis-

leading as they accurately describe the Florida Prepaid College Program.

17. Denies. Defendant Florida Prepaid denies that it has made any false or misleading statements regarding the Florida Prepaid College Program. Defendant Florida Prepaid further denies that the statements referred to by Plaintiff are material misrepresentations. The "Banking on College" article which Plaintiff makes reference to is a document which speaks for itself.

18. Denies. Defendant Florida Prepaid denies Plaintiff's characterization of the guarantee and the obligations of the State of Florida. The statements made in the marketing material and the Master Covenant, including paragraph 5.08 of the Master Covenant, apply to all of the beneficiaries of the Florida Prepaid College Program.

19. Denies. To the extent that the allegations contained in this paragraph state legal conclusions, no responsive pleading is required. Defendant Florida Prepaid denies that it has made any false or misleading statements regarding the Florida Prepaid College Program, or that any statements which it has made constitute violations of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

20. Denies. Defendant Florida Prepaid denies that Plaintiff has been or ever will be damaged by any of its actions or inactions.

COUNT II

21. Defendant Florida Prepaid incorporates by reference its answers to paragraphs 1 through 20 as if set forth at length herein.

22. Denies. Defendant Florida Prepaid denies Plaintiff's characterization of the statement which appears in the 1994 Marketing Brochure. The 1994 Marketing Brochure is a

document which speaks for itself. The statement quoted does not state that the tax ruling was issued on the Florida Prepaid College Program. Additionally, Defendant Florida Prepaid denies that the statement quoted is just an "example" of similar statements made by it. The statement quoted is the only statement of its kind that appears in any of the promotional materials distributed by Florida Prepaid.

23. Admits in part, denies in part. Defendant Florida Prepaid admits that the IRS has not issued a tax ruling on the Florida Prepaid College Program, and that it did request a ruling from the IRS. Defendant Florida Prepaid denies that it has ever represented that it received a ruling directly from the IRS. Defendant Florida Prepaid denies the remaining allegations in this paragraph.

24. Denies. Defendant Florida Prepaid is without knowledge or information sufficient to form a belief as to the allegation that, "[t]here is a substantial risk that the tax liability will fall on the purchaser, not the beneficiary." Therefore, this allegation is denied and strict proof is demanded at the time of trial. Defendant Florida Prepaid denies the remainder of the allegations in this paragraph. The Master Covenant referred to in this paragraph should be read in conjunction with the other promotional materials distributed by Florida Prepaid.

25. Denies. Defendant Florida Prepaid is without knowledge or information sufficient to form a belief as to the truth of Plaintiff's allegation that "[t]here is also a substantial risk that the purchaser or beneficiary will have to pay annual taxes on the imputed income." This allegation is therefore denied, and strict proof is demanded at the time of trial. Defendant Florida Prepaid further denies that it was obligated to disclose this alleged fact in its promotional materials.

26. Denies. Defendant Florida Prepaid denies that it was under any obligation to advise potential purchasers to seek advice from their tax advisors.

27. Denies. Defendant Florida Prepaid denies that it has made any false or misleading statements regarding IRS rulings regarding the tax treatment of the Florida Prepaid College Program. Defendant Florida Prepaid further denies that it has made any statements which violate Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

28. Denies. Defendant Florida Prepaid denies that Plaintiff has been or ever will be damaged by any of its actions or inactions.

COUNT III

29. Defendant Florida Prepaid incorporates by reference its answers to paragraphs 1 through 28 as if set forth at length herein.

30. Denies. Defendant Florida Prepaid denies that it has falsely represented how the assets are invested and whether there is any risk of default. The 1994 Annual Report, portions of which are attached to Plaintiff's Complaint as Exhibit 4, is a document which speaks for itself. (A complete copy of the 1994 Annual Report is attached hereto as Exhibit B).

31. Denies. Defendant Florida Prepaid denies that it has falsely implied, with any statements, that the Florida Prepaid College Program is free of credit risk.

32. Denies. Defendant Florida Prepaid denies that it has made any false or misleading representations. Some of the assets are invested in Resolution Funding Corporation Bonds which are each collateralized by a United States Treasury Bond. The United States treasury Bonds which back each of

the Resolution Funding Corporation Bonds are backed by the "Full Faith and Credit" of the United States Government.

33. Denies. Defendant Florida Prepaid denies that it has made any false or misleading statements which constitute violations of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

34. Denies. Defendant Florida Prepaid denies that Plaintiff has been or ever will be damaged by any of its actions or inactions.

COUNT IV

35. Defendant Florida Prepaid incorporates by reference its answers to paragraphs 1 through 34 as if set forth at length herein.

36. Admits in part, denies in part. Defendant Florida Prepaid admits that Plaintiff commenced a patent infringement action against it in November, 1994. Defendant Florida Prepaid denies Plaintiff's characterization of what is "vital to the current operations of Florida Prepaid" and how that may be effected by the unwarranted allegations of patent infringement.

37. Denies. The allegations in this paragraph state legal conclusions to which no response is required.

38. Admits in part, denies in part. Defendant Florida Prepaid admits that the 1995 Annual Report does not make reference to the patent infringement lawsuit. Defendant Florida Prepaid denies that it was obligated to disclose the existence of the patent infringement lawsuit in the 1995 Annual Report. Additionally, although the 1995 Annual Report was published on or after March 31, 1995, the financial information contained in the report does not cover the time period during which Florida Prepaid was served with

the complaint. Therefore, Defendant Florida Prepaid denies the remainder of the allegations in this paragraph.

39. Denies. Defendant Florida Prepaid denies the allegations contained in this paragraph. For the reasons stated in its answer to paragraph 38, Defendant Florida Prepaid could not have disclosed the existence of the patent infringement litigation in the 1995 Annual Report. Defendant Florida Prepaid also denies that it was obligated to disclose the existence of the patent infringement lawsuit in the 1995 Annual Report. Defendant Florida Prepaid further denies that it has made any false or misleading statements or any statements which constitute violations of Section 43(a) of the Lanham Act. 15 U.S.C. §1125(a).

40. Denies. Defendant Florida Prepaid denies that Plaintiff has been or ever will be damaged by any of its actions or inactions.

COUNT V

41. Defendant Florida Prepaid incorporates by reference its answers to paragraphs 1 through 40 as if set forth at length herein.

42. Denies. Defendant Florida Prepaid denies that it has made any misstatements or misrepresentations or any statements that violate the New Jersey common law of unfair competition. Defendant Florida Prepaid further denies that Plaintiff has been or ever will be damaged by any of its actions or inactions.

WHEREFORE, Defendant Florida Prepaid Postsecondary Education Expense Board demands judgment in its favor and against Plaintiff College Savings Bank on all counts of the Complaint, together with attorneys' fees and costs, and any such further relief as the Court deems just and proper.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim against Florida Prepaid upon which relief may be granted.

2. Plaintiff's alleged damages were caused, in whole or in part, by its own actions or inactions.

3. Plaintiff's claims are barred by the doctrine of estoppel.

4. Plaintiff's claims are barred by the doctrine of waiver.

5. Plaintiff's claims are barred by the doctrine of laches.

6. Plaintiff's claims are barred by the doctrine of unclean hands.

7. At all times herein, Defendant Florida Prepaid acted appropriately and accurately represented the Florida Prepaid College Program.

8. Plaintiff's Complaint fails to state a claim under Section 43(a) of the Lanham act. 15 U.S.C. §1125(a), because none of the statements made by Florida Prepaid, upon which Plaintiff relies, are literally false.

9. All of the statements made by Florida Prepaid in its marketing materials and in the Master Covenant accurately describe the Florida Prepaid College Program and the obligations of the State of Florida. The Master Covenant should be read in conjunction with the other promotional materials.

10. Plaintiff's Complaint fails to state a claim under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), because none of the statements made by Florida Prepaid, upon which Plaintiff relies, are misleading.

11. Plaintiff's Complaint fails to state a claim under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), because none of the statements made by Florida Prepaid, upon which

Plaintiff relies, have deceived, or have a tendency to deceive a substantial portion of the intended audience.

12. Plaintiff's Complaint fails to state a claim under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), because none of the statements made by Florida Prepaid, upon which Plaintiff relies, are material misrepresentations because they have not and cannot influence the purchasing decisions of the consumer.

13. According to Plaintiff's Complaint, once purchasers have the Master Covenant, they are fully informed regarding the Florida Prepaid College Program and the obligations of the State of Florida. Purchasers have the Master Covenant before they make their first payment into the program. Therefore, according to Plaintiff's allegations, at the time the first payment is made, the consumer is fully informed. Therefore, the purchasing decision of the consumer has not been influenced by any allegedly false or misleading statements made by Florida Prepaid, and, therefore, Plaintiff's Complaint fails to state a claim under §43(a) of the Lanham Act, 15 U.S.C. §1125(a).

14. Plaintiff's Complaint fails to state a claim under Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), because none of the statements made by Florida Prepaid, upon which Plaintiff relies, caused or will cause any injury to Plaintiff, including, but not limited to, declining sales or loss of good will.

15. The number of contracts which Florida Prepaid has sold to New Jersey residents is de minimis. Florida Prepaid has sold over 327,000 accounts, which include only approximately 200 sold to New Jersey residents.

16. The Florida Prepaid College Program is one which the State of Florida considers to be an essential government operation to assist its citizens to access higher education. It

provides a great benefit to children who are residents of the State of Florida.

17. Any impact which the Florida Prepaid College Program has had on College Savings Bank is de minimis.

18. The potential harm which College Savings Bank may inflict on the Florida Prepaid College Program as a result of this lawsuit, and any injunction which Plaintiff may seek, greatly outweighs any alleged harm which College Savings Bank allegedly suffer as a result of the few contracts which Florida Prepaid has sold to New Jersey residents.

19. In its "Information Kit," Plaintiff makes a number of representations similar to those statements of Florida Prepaid which it claims are false or misleading.

20. Plaintiff claims that its CollegeSure® Certificate of Deposit (CD) is "The Guaranteed Way To Save For College®."

21. Plaintiff claims that its CD is "the only investment indexed to college costs and one hundred percent guaranteed to pay tuition, fees, room and board — even if those costs skyrocket."

22. Plaintiff claims that its CD is a "risk-free way to help families meet the rising cost of college."

23. Plaintiff claims that its CD is "the only guaranteed, risk-free way to save for college."

24. Plaintiff claims that "[w]hatever percentage of college costs you prepay now is guaranteed to be at least the same percentage at maturity, no matter how high college costs rise."

25. Plaintiff claims that "[t]he CollegeSure CD provides peace of mind no other investment can offer. Because it is guaranteed to meet college costs, you can rest assured your child's education funding is a certainty."

26. Plaintiff claims that it is "one of the safest banks in the United States."

27. Plaintiff claims that "[t]he combination of FDIC insurance, the Bank's high Tier 1 capital-to-total-assets and risk-based capital ratios as well as the Bank's conservative investment policy ensures the safety of your deposits."

28. The representations which Plaintiff makes in its Information Kit, including those stated in paragraphs 21 through 28 above, imply that other prepaid college programs, including the Florida Prepaid college Program are inferior to the CollegeSure® CD.

29. Because of the representations which Plaintiff makes in its Information Kit, including those stated in paragraphs 21 through 28 above, Plaintiff brings its claims with unclean hands and is estopped and/or has waived its right to assert such claims.

30. In an advertisement that is included in Plaintiff's Information Kit and which Plaintiff placed in the November 1995 issue of *Worth Magazine*, the following statement is made:

> Unlike [state] pre-paid plans (which we *don't* recommend), if Junior gets a scholarship or doesn't want to go to college when the time comes, you get *all* your money back *plus* all the interest. It's yours to do with as you please; no strings attached.

31. This advertisement misrepresents the Florida Prepaid College Program. Under the Florida Prepaid College Program, if a child receives a scholarship, and if the scholarship covers the same benefits as the prepaid contract, the purchaser is entitled to a refund in the amount of either the amount paid in plus 5 percent interest, compounded annually, or the value of Florida public tuition, for each semester covered by the scholarship, whichever is less. (*See* 1994

Marketing Brochure attached to Plaintiff's Complaint as Exhibit 1, page 15). Additionally, a contract may be transferred to a brother, sister, half brother, half sister, stepbrother or stepsister of the qualified beneficiary. (*See* Exhibit 1 to Plaintiff's Complaint, page 14).

COUNTERCLAIM

Parties

1. Florida Prepaid is an agency of the State of Florida pursuant to Section 240.551, Florida Statutes, with its principal place of business located at Suite 210, 1801 Hermitage Boulevard, Tallahassee, Florida 32308.

2. College Savings Bank is a New Jersey chartered savings bank, with its principal place of business located at 5 Vaughn Drive, Princeton, New Jersey 08540.

Jurisdiction and Venue

3. Jurisdiction of this counterclaim is based upon 28 U.S.C. §1332, as the matter in controversy exceeds the sum or value of $50,000.00 and is between citizens of different states.

4. Venue is proper is this Court pursuant to 28 U.S.C. §1391.

Background

5. Florida Prepaid incorporates by reference its answer to Plaintiff's Complaint and the statements made in its affirmative defenses as if set forth at length herein.

6. Since 1988 Florida Prepaid has been administering and promoting a tuition prepayment program (the "Florida Prepaid College Program"). pursuant to which it offers contracts to purchasers of a program that locks in certain costs a child's education at a fixed price.

7. Purchasers can choose contracts, based on a specific number of credit hours, that offer four years at a state university, two years at a community college or two years at a community college plus two years at a state university. Additionally, purchasers may buy dormitory plans which cover up to five years in a dormitory. Purchasers can elect to make payments in a single lump sum or in installments.

8. Florida Prepaid has been very successful in selling contracts for the Florida Prepaid College Program. to date, it has sold in excess of 327,000 contracts. The contracts are sold primarily to Florida residents because, with limited exceptions, only Florida residents are qualified beneficiaries under the program.

9. The Florida Prepaid College Program provides a great benefit to children who are residents of the State of Florida. The State of Florida considers the Florida Prepaid College Program to be an essential government operation to assist its citizens gain access to higher education.

10. Florida Prepaid promotes the Florida Prepaid College Program through its marketing brochures and other forms of advertisement.

11. All of the statements made by Florida Prepaid in its marketing materials accurately describe the Florida Prepaid College Program and the obligations of the State of Florida with respect to the program.

12. On or about September 13, 1995, shortly after the instant action was filed, an article appeared in the *Miami Daily Business Review*, entitled "Prepaid College Plan Faces New Suit From Rival." A copy of the article is attached hereto as Exhibit C.

13. The article describes the lawsuit and the statements which Florida Prepaid makes in its marketing materials which College Savings Bank alleges are false or misleading.

14. Peter Roberts ("Roberts"), President and Chief Financial Officer of College Savings Bank is quoted in the article. Roberts comments on the statements made in Florida Prepaid's marketing materials by stating:

> At best those claims are half-truths, and at worst they're outright lies.

(*See* Exhibit C).

15. This statement by Roberts, acting in his corporate capacity as President and Chief Executive Officer of College savings Bank, is false, malicious and has and will continue to cause Florida Prepaid injury to its business and its reputation.

COUNT I - PRODUCT DISPARAGEMENT

16. Florida Prepaid incorporates by reference the allegations contained in paragraphs 1 through 15 above as if set forth at length herein.

17. The statement made by Roberts, for and on behalf of College Savings Bank, which was published in the *Miami Daily Business Review* on or about September 13, 1995 (the "statement made by College Savings Bank"), is a false statement which disparages the quality of the product of Florida Prepaid.

18. The statement made by College Savings Bank is derogatory to the quality of the contracts sold by Florida Prepaid, derogatory to the Florida Prepaid College Program, and derogatory to the business in general of Florida Prepaid.

19. The statement made by College Savings Bank was calculated to prevent potential purchasers from purchasing contracts from Florida Prepaid.

20. The statement made by College Savings Bank was calculated to interfere with Florida Prepaid's relationship

with potential and existing purchasers to the detriment of Florida Prepaid.

21. Neither Roberts nor College Savings Bank possess any privilege which entitled them to make this false statement about Florida Prepaid and/or the Florida Prepaid College Program.

22. The statement made by College Savings bank has and will continue to cause Florida Prepaid injury to its business and reputation.

WHEREFORE, Florida Prepaid Postsecondary Education Expense Board demands judgment in its favor and against College Savings Bank for compensatory damages, punitive damages, costs of suit, attorneys' fees, and such further relief as the Court deems just and proper.

COUNT II - TRADE LIBEL

23. Florida Prepaid incorporates by reference the allegations contained in paragraphs 1 through 22 above as if set forth at length herein.

24. The statement made by College Savings Bank, which was published in the *Miami Daily Business Review* on or about September 13, 1995, is a false statement.

25. The statement made by College Savings Bank constitutes malicious interference with Florida Prepaid's business.

26. The statement made by College Savings Bank was made with malice and with the intent to interfere with Florida Prepaid's relationship with potential and existing purchasers of its contracts.

27. The statement made by College Savings Bank has interfered with Florida Prepaid's relationship with potential and existing purchasers.

28. Neither Roberts nor College Savings Bank possess any privilege which entitled them to make this false statement about Florida Prepaid and/or the Florida Prepaid College Program.

29. The statement made by College Savings Bank has and will continue to cause Florida Prepaid injury to its business and reputation.

WHEREFORE, Florida Prepaid Postsecondary Education Expense Board demands judgment in its favor and against College Savings Bank for compensatory damages, punitive damages, costs of suit, attorneys' fees, and such further relief as the Court deems just and proper.

COUNT III - DEFAMATION

30. Florida Prepaid incorporates by reference the allegations contained in paragraphs 1 through 29 above as if set forth at length herein.

31. The statement made by College Savings Bank, which was published in the *Miami Daily Business Review* on or about September 13, 1995, is a false statement.

32. The statement made by College Savings Bank was made with malice and with the intent to damage the reputation of Florida Prepaid and the Florida Prepaid College Program.

33. The statement made by College Savings Bank has damaged the reputation of Florida Prepaid and the Florida Prepaid College Program

34. Neither Roberts nor College Savings Bank possess any privilege which entitled them to make this false statement about Florida Prepaid and/or the Florida Prepaid College Program.

35. The statement made by College Savings Bank has and will continue to cause Florida Prepaid injury to its business and reputation.

WHEREFORE, Florida Prepaid Postsecondary Education Expense Board demands judgment in its favor and against College Savings Bank for compensatory damages, punitive damages, costs of suit, attorneys' fees, and such further relief as the Court deems just and proper.

ECKERT SEAMANS CHERIN & MELLOTT

/s/ Anne E. Hendricks

Anne E. Hendricks (AEH 1009)
Steven C. Benjamin (SCB 3111)
One Eves Drive, Suite 111
Marlton, New Jersey 08053
(609) 983-7033

TITLE XVI EDUCATION
CHAPTER 240 POSTSECONDARY EDUCATION
PART V SPECIFIC PROGRAMS AND INSTITUTIONS
FLA. STAT. § 240.551 (1996)

240.551 Florida Prepaid Postsecondary Education Expense Program.

(1) The Legislature recognizes that educational opportunity at the postsecondary level is a critical state interest. It further recognizes that educational opportunity is best ensured through the provision of postsecondary institutions that are geographically and financially accessible. Accordingly, it is the intent of the Legislature that a program be established through which many of the costs associated with postsecondary attendance may be paid in advance and fixed at a guaranteed level for the duration of undergraduate enrollment. It is similarly the intent of the Legislature to provide a program that fosters timely financial planning for postsecondary attendance and to encourage employer participation in such planning through program contributions on behalf of employees and the dependents of employees.

(2) As used in this section:

(a) "Advance payment contract" means a contract entered into by the board and a purchaser pursuant to this section.

(b) "Board" means the Prepaid Postsecondary Education Expense Board.

(c) "Fund" means the Prepaid Postsecondary Education Expense Trust Fund.

(d) "Purchaser" means a person who makes or is obligated to make advance registration or dormitory residence payments in accordance with an advance payment contract.

(e) "Qualified beneficiary" means:

1. A resident of this state at the time a purchaser enters into an advance payment contract on behalf of the resident;

2. A nonresident who is the child of a noncustodial parent who is a resident of this state at the time that such parent enters into an advance payment contract on behalf of the child; or

3. For purposes of advance payment contracts entered into pursuant to paragraph (5) (j), a graduate of an accredited high school in this state who is a resident of this state at the time he or she is designated to receive the benefits of the advance payment contract.

(f) "State postsecondary institution" means any community college identified in § 240.3031 or university identified in § 240.2011.

(g) "Program" means the Florida Prepaid Postsecondary Education Expense Program.

(h) "Registration fee" means matriculation fee, financial aid fee, building fee, and Capital Improvement Trust Fund fee.

(3) There is created a Florida Prepaid Postsecondary Education Expense Program to provide a medium through which the cost of registration and dormitory residence may be paid in advance of enrollment in a state postsecondary institution at a rate lower than the projected corresponding

cost at the time of actual enrollment. Such payments shall be combined and invested in a manner that yields, at a minimum, sufficient interest to generate the difference between the prepaid amount and the cost of registration and dormitory residence at the time of actual enrollment. Students who enroll in a state postsecondary institution pursuant to this section shall be charged no fees in excess of the terms delineated in the advance payment contract.

(4) There is created within the State Board of Administration the Prepaid Postsecondary Education Expense Trust Fund. The fund shall consist of state appropriations, moneys acquired from other governmental or private sources, and moneys remitted in accordance with advance payment contracts. All funds deposited into the trust fund may be invested pursuant to § 215.47; however, such investment shall not be mandatory. Dividends, interest, and gains accruing to the trust fund shall increase the total funds available for the program. Notwithstanding the provisions of chapter 717, funds associated with contracts terminated pursuant to paragraph (6) (d) and canceled contracts for which no refunds have been claimed shall increase the total funds available for the program. However, the board shall establish procedures for notifying purchasers who subsequently cancel their contracts of any unclaimed refund and shall establish a time period after which no refund may be claimed by a purchaser who canceled a contract. Any balance contained within the fund at the end of a fiscal year shall remain therein and shall be available for carrying out the purposes of the program. In the event that dividends, interest, and gains exceeds the amount necessary for program administration and disbursements, the board may designate an additional percentage of the fund to serve as a contingency fund. Moneys contained within the fund shall be exempt from the investment requirements of § 18.10. Any funds of a

direct-support organization created pursuant to paragraph (5) (j) shall be exempt from the provisions of this paragraph.

(5) The Florida Prepaid Postsecondary Education Expense Program shall be administered by the Prepaid Postsecondary Education Expense Board as an agency of the state. The Prepaid Postsecondary Education Expense Board is hereby created as a body corporate with all the powers of a body corporate for the purposes delineated in this section. For the purposes of § 6, Art. IV of the State Constitution, the board shall be assigned to and administratively housed within the State Board of Administration, but it shall independently exercise the powers and duties specified in this section. The board shall consist of seven members to be composed of the Insurance Commissioner and Treasurer, the Comptroller, the Chancellor of the Board of Regents, the Executive Director of the State Board of Community Colleges, and three members appointed by the Governor and subject to confirmation by the Senate. Each member appointed by the Governor shall possess knowledge, skill, and experience in the areas of accounting, actuary, risk management, or investment management. Each member of the board not appointed by the Governor may name a designee to serve the board on behalf of the member; however, any designee so named shall meet the qualifications required of gubernatorial appointees to the board. Members appointed by the Governor shall serve terms of 3 years except that, in making the initial appointments, the Governor shall appoint one member to serve for 1 year, one member to serve for 2 years, and one member to serve for 3 years. Any person appointed to fill a vacancy on the board shall be appointed in a like manner and shall serve for only the unexpired term. Any member shall be eligible for reappointment and shall serve until a successor qualifies. Members of the board shall serve without compensation but shall be reimbursed for per diem and travel in accordance with § 112.061. Each member

of the board shall file a full and public disclosure of his or her financial interests pursuant to § 8, Art. II of the State Constitution and corresponding statute.

(a) The Governor shall appoint a member of the board to serve as the initial chair of the board. Thereafter, the board shall elect a chair annually. The board shall annually elect a board member to serve as vice chair and shall designate a secretary-treasurer who need not be a member of the board. The secretary-treasurer shall keep a record of the proceedings of the board and shall be the custodian of all printed material filed with or by the board and of its official seal. Notwithstanding the existence of vacancies on the board, a majority of the members shall constitute a quorum. The board shall take no official action in the absence of a quorum. The board shall meet, at a minimum, on a quarterly basis at the call of the chair.

(b) The board shall appoint an executive director to serve as the chief administrative and operational officer of the board and to perform other duties assigned to him or her by the board.

(c) The board shall have the powers necessary or proper to carry out the provisions of this section, including, but not limited to, the power to:

1. Adopt an official seal and rules.

2. Sue and be sued.

3. Make and execute contracts and other necessary instruments.

4. Establish agreements or other transactions with federal, state, and local agencies, including state universities and community colleges.

5. Invest funds not required for immediate disbursement.

6. Appear in its own behalf before boards, commissions, or other governmental agencies.

7. Hold, buy, and sell any instruments, obligations, securities, and property determined appropriate by the board.

8. Require a reasonable length of state residence for qualified beneficiaries.

9. Restrict the number of participants in the community college plan, university plan, and dormitory residence plan, respectively. However, any person denied participation solely on the basis of such restriction shall be granted priority for participation during the succeeding year.

10. Segregate contributions and payments to the fund into various accounts and funds.

11. Contract for necessary goods and services, employ necessary personnel, and engage the services of private consultants, actuaries, managers, legal counsel, and auditors for administrative or technical assistance.

12. Solicit and accept gifts, grants, loans, and other aids from any source or participate in any other way in any government program to carry out the purposes of this section.

13. Require and collect administrative fees and charges in connection with any transaction and impose reasonable penalties, including default, for delinquent payments or for entering into an advance payment contract on a fraudulent basis.

14. Procure insurance against any loss in connection with the property, assets, and activities of the fund or the board.

15. Impose reasonable time limits on use of the tuition benefits provided by the program. However, any such limitation shall be specified within the advance payment contract.

16. Delineate the terms and conditions under which payments may be withdrawn from the fund and impose reasonable fees and charges for such withdrawal. Such terms and conditions shall be specified within the advance payment contract.

17. Provide for the receipt of contributions in lump sums or installment payments.

18. Establish other policies, procedures, and criteria to implement and administer the provisions of this section.

19. Require that purchasers of advance payment contracts verify, under oath, any requests for contract conversions, substitutions, transfers, cancellations, refund requests, or contract changes of any nature. Verification shall be accomplished as authorized and provided for in § 92.525(1)(a).

(d) The board shall administer the fund in a manner that is sufficiently actuarially sound to defray the obligations of the program. The board shall annually evaluate or cause to be evaluated the actuarial soundness of the fund. If the board perceives a need for additional assets in order to preserve actuarial soundness, the board may adjust the terms of subsequent advance payment contracts to ensure such soundness.

(e) The board, acting with the approval of the State Board of Administration, shall establish a comprehensive investment plan for the purposes of this section. The comprehensive investment plan shall specify the investment

policies to be utilized by the board in its administration of the fund. The board may place assets of the fund in savings accounts or use the same to purchase fixed or variable life insurance or annuity contracts, securities, evidence of indebtedness, or other investment products pursuant to the comprehensive investment plan and in such proportions as may be designated or approved under that plan. Such insurance, annuity, savings, or investment products shall be underwritten and offered in compliance with the applicable federal and state laws, regulations, and rules by persons who are duly authorized by applicable federal and state authorities. Within the comprehensive investment plan, the board may authorize investment vehicles, or products incident thereto, as may be available or offered by qualified companies or persons.

(f) The board may delegate responsibility for administration of the comprehensive investment plan required in paragraph (e) to a person the board determines to be qualified. Such person shall be compensated by the board. Directly or through such person, the board may contract with a private corporation or institution to provide such services as may be a part of the comprehensive investment plan or as may be deemed necessary or proper by the board or such person, including, but not limited to, providing consolidated billing, individual and collective recordkeeping and accountings, and asset purchase, control, and safekeeping.

(g) The board shall annually prepare or cause to be prepared a report setting forth in appropriate detail an accounting of the fund and a description of the financial condition of the program at the close of each fiscal year. Such report shall be submitted to the President of the Senate, the Speaker of the House of Representatives, and members of the State Board of Education on or before March 31 each year. In

addition, the board shall make the report available to purchasers of advance payment contracts. The board shall provide to the Board of Regents and the State Board of Community Colleges by March 31 each year complete advance payment contract sales information including projected postsecondary enrollments of qualified beneficiaries. The accounts of the fund shall be subject to annual audits by the Auditor General or his or her designee.

(h) The board shall solicit answers to applicable ruling requests from the Internal Revenue Service regarding the tax status of fees paid pursuant to an advance payment contract to the purchaser or qualified beneficiary and from the Securities and Exchange Commission regarding the application of federal securities laws to the trust. The board shall make the status of such requests known before entering into an advance payment contract.

(i) The board shall solicit proposals for the marketing of the Florida Prepaid Postsecondary Education Expense Program pursuant to § 287.057. The entity designated pursuant to this paragraph shall serve as a centralized marketing agent for the program and shall be solely responsible for the marketing of the program. Any materials produced for the purpose of marketing the program shall be submitted to the board for review. No such materials shall be made available to the public before the materials are approved by the board. Any educational institution may distribute marketing materials produced for the program; however, all such materials shall have been approved by the board prior to distribution. Neither the state nor the board shall be liable for misrepresentation of the program by a marketing agent.

(j) The board may establish a direct-support organization which is:

1. A Florida corporation, not for profit, incorporated under the provisions of chapter 617 and approved by the Secretary of State.

2. Organized and operated exclusively to receive, hold, invest, and administer property and to make expenditures to or for the benefit of the program.

3. An organization which the board, after review, has certified to be operating in a manner consistent with the goals of the program and in the best interests of the state. Unless so certified, the organization may not use the name of the program.

4. Subject to an annual postaudit by an independent certified public accountant in accordance with rules promulgated by the board. The annual audit shall be submitted to the Department of Insurance and the Auditor General for review. The Department of Insurance and Auditor General shall have the authority to require and receive from the organization or its independent auditor any detail or supplemental data relative to the operation of the organization. The identity of donors who desire to remain anonymous shall be confidential and exempt from the provisions of§ 119.07(1) and§ 24(a), Art. I of the State Constitution, and such anonymity shall be maintained in the auditor's report. Information received by the organization that is otherwise confidential or exempt by law shall retain such status. Any sensitive, personal information regarding contract beneficiaries, including their identities, is exempt from the provisions of§ 119.07(1) and§ 24(a), Art. I of the State Constitution.

The chair of the board and the executive director shall be directors of the direct-support organization and shall jointly

name three other individuals to serve as directors of the organization.

(k) The board may endorse insurance coverage written exclusively for the purpose of protecting advance payment contracts, and the purchasers or beneficiaries thereof, which may be issued in the form of a group life policy and which is exempt from the provisions of part V of chapter 627.

(6) (a) The board shall construct advance payment contracts for registration and advance payment contracts for dormitory residence in accordance with the provisions of this section. Advance payment contracts constructed for the purposes of this section shall be exempt from the provisions of the Florida Insurance Code. The board may request assistance from the Department of Legal Affairs in the development of the advance payment contracts. The contents of both such contracts shall include, but not be limited to, the following:

1. The amount of the payment or payments and the number of payments required from a purchaser on behalf of a qualified beneficiary.

2. The terms and conditions under which purchasers shall remit payments, including, but not limited to, the date or dates upon which each payment shall be due.

3. Provisions for late payment charges and for default.

4. Provisions for penalty fees for withdrawals from the fund.

5. Except for an advance payment contract entered into pursuant to paragraph (5) (j), the name and date of birth of the qualified beneficiary on whose behalf the contract is

drawn and the terms and conditions under which another person may be substituted as the qualified beneficiary.

6. The name of any person who may terminate the contract. The terms of the contract shall specify whether the contract may be terminated by the purchaser, the qualified beneficiary, a specific designated person, or any combination of these persons.

7. The terms and conditions under which a contract may be terminated, the name of the person entitled to any refund due as a result of termination of the contract pursuant to such terms and conditions, and the amount of refund, if any, due to the person so named.

8. The time limitations, if any, within which the qualified beneficiary must claim his or her benefits through the program.

9. Other terms and conditions deemed by the board to be necessary or proper.

(b) In addition to the provisions of paragraph (a), an advance payment contract for registration shall include, but not be limited to, the following:

1. The number of semester credit hours contracted by the purchaser.

2. The state postsecondary system toward which the contracted credit hours will be applied.

3. The assumption of a contractual obligation by the board to the qualified beneficiary to provide for a specified number of semester credit hours of undergraduate instruction at a state postsecondary institution, not to exceed the average number of credit hours required for the conference of the

degree that corresponds to the plan purchased on behalf of the qualified beneficiary.

(c) In addition to the provisions of paragraph (a), an advance payment contract for dormitory residence shall include, but not be limited to, the following:

1. The number of semesters of dormitory residence contracted by the purchaser.

2. The assumption of a contractual obligation by the board to the qualified beneficiary to provide for a specified number of semesters of dormitory residence at a state university, not to exceed the maximum number of semesters of full-time enrollment required for the conference of a baccalaureate degree.

(d) An advance payment contract may provide that contracts which have not been terminated or the benefits exercised within a specified period of time shall be considered terminated. Time expended by a qualified beneficiary as an active duty member of any of the armed services of the United States shall be added to the period of time specified pursuant to this paragraph. No purchaser or qualified beneficiary whose advance payment contract is terminated pursuant to this paragraph shall be entitled to a refund. The board shall retain any moneys paid by the purchaser for an advance payment contract that has been terminated in accordance with this paragraph. Such moneys retained by the board are exempt from chapter 717, and such retained moneys must be used by the board to further the purposes of this section.

(e) 1. No refund provided pursuant to subparagraph (a) 7. shall exceed the amount paid into the fund by the purchaser. In the event that an advance payment contract is converted from a university to a community college registration plan, the refund amount shall be reduced by the

amount transferred to a community college on behalf of the qualified beneficiary. However, refunds may exceed the amount paid into the fund in the following circumstances:

a. If the beneficiary is awarded a scholarship, the terms of which cover the benefits included in the advance payment contracts, moneys paid for the purchase of the advance payment contracts shall be returned to the purchaser in semester installments coinciding with the matriculation by the beneficiary in amounts of either the original purchase price plus 5 percent compounded interest, or the current rates at state postsecondary institutions, whichever is less.

b. In the event of the death or total disability of the beneficiary, moneys paid for the purchase of advance payment contracts shall be returned to the purchaser together with 5 percent compounded interest, or the current rates at state postsecondary institutions, whichever is less.

c. If an advance payment contract is converted from a university plan to a community college plan or a community college plus university plan, or is converted from a community college plus university plan to a community college plan, the amount refunded shall be the value of the original advance payment contract minus the value of the contract after the conversion.

2. No refund shall be authorized through an advance payment contract for any school year partially attended but not completed. For purposes of this section, a school year partially attended but not completed shall mean any one semester whereby the student is still enrolled at the conclusion of the official drop-add period, but withdraws before the end of such semester. If a beneficiary does not complete a community college plan or university plan for reasons other than specified in subparagraph 1., the purchaser shall receive

a refund of the amount paid into the fund for the remaining unattended years of the advance payment contract pursuant to rules promulgated by the board.

(f) Information that identifies the purchasers or beneficiaries of any plan promulgated under this section and their advance payment account activities is exempt from the provisions of§ 119.07(1). However, the board may authorize the program's records administrator to release such information to a community college, college, or university in which a beneficiary may enroll or is enrolled. Community colleges, colleges, and universities shall maintain such information as exempt from the provisions of § 119.07(1).

(7) At a minimum, the board shall make advance payment contracts available for three independent plans to be known as the community college plan, the university plan, and the dormitory residence plan, respectively.

(a) Through the community college plan, the advance payment contract shall provide prepaid registration fees for a specified number of undergraduate semester credit hours not to exceed the average number of hours required for the conference of an associate degree. The cost of participation in the community college plan shall be based primarily on the average current and projected registration fees within the State Community College System and the number of years expected to elapse between the purchase of the plan on behalf of a qualified beneficiary and the exercise of the benefits provided in the plan by such beneficiary. Qualified beneficiaries shall bear the cost of any laboratory fees associated with enrollment in specific courses. Each qualified beneficiary shall be classified as a resident for tuition purposes pursuant to § 240.1201 regardless of his or her actual legal residence.

(b) Through the university plan, the advance payment contract shall provide prepaid registration fees for a specified number of undergraduate semester credit hours not to exceed the average number of hours required for the conference of a baccalaureate degree. The cost of participation in the university plan shall be based primarily on the current and projected registration fees within the State University System and the number of years expected to elapse between the purchase of the plan on behalf of a qualified beneficiary and the exercise of the benefits provided in the plan by such beneficiary. Qualified beneficiaries shall bear the cost of any laboratory fees associated with enrollment in specific courses. In the event that a qualified beneficiary fails to be admitted to a state university or chooses to attend a community college, the qualified beneficiary may convert the average number of semester credit hours required for the conference of an associate degree from a university plan to a community college plan and may retain the remaining semester credit hours in the university plan or may request a refund for prepaid credit hours in excess of the average number of semester credit hours required for the conference of an associate degree pursuant to subparagraph (6) (a) 7. Each qualified beneficiary shall be classified as a resident for tuition purposes pursuant to § 240.1201 regardless of his or her actual legal residence.

(c) Through the dormitory residence plan, the advance payment contract shall provide prepaid housing fees for a maximum of 10 semesters of full-time undergraduate enrollment in a state university. Dormitory residence plans are optional and may be purchased only in conjunction with a university plan. Dormitory residence plans shall be purchased in increments of 2 semesters. The cost of participation in the dormitory residence plan shall be based primarily on the average current and projected housing fees

within the State University System and the number of years expected to elapse between the purchase of the plan on behalf of a qualified beneficiary and the exercise of the benefits provided in the plan by such beneficiary. Qualified beneficiaries shall bear the cost of any additional elective charges such as laundry service or long-distance telephone service. Each state university may specify the residence halls or other university-held residences eligible for inclusion in the plan. In addition, any state university may request immediate termination of a dormitory residence contract based on a violation or multiple violations of rules of the residence hall or other university-held residences. Qualified beneficiaries shall have the highest priority in the assignment of housing within university residence halls. In the event that sufficient housing is not available for all qualified beneficiaries, the board shall refund the purchaser or qualified beneficiary an amount equal to the fees charged for dormitory residence during that semester. If a qualified beneficiary fails to be admitted to a state university or chooses to attend a community college that operates one or more dormitories or residency opportunities, or has one or more dormitories or residency opportunities operated by the community college direct-support organization, the qualified beneficiary may transfer or cause to have transferred to the community college, or community college direct-support organization, the fees associated with dormitory residence. Dormitory fees transferred to the community college or community college direct-support organization may not exceed the maximum fees charged for state university dormitory residence for the purposes of this section, or the fees charged for community college or community college direct-support organization dormitories or residency opportunities, whichever is less.

(d) A qualified beneficiary may apply a community college plan, university plan, or dormitory residence plan

toward any eligible independent college or university. An independent college or university which is located and chartered in Florida, is not for profit, is accredited by the Commission on Colleges of the Southern Association of Colleges and Schools or the Accrediting Commission of the Association of Independent Colleges and Schools, and which confers degrees as defined in§ 246.021 shall be eligible for such application. The board shall transfer or cause to have transferred to the eligible independent college or university designated by the qualified beneficiary an amount not to exceed the redemption value of the advance payment contract within a state postsecondary institution. In the event that the cost of registration or housing fees at the independent college or university is less than the corresponding fees at a state postsecondary institution, the amount transferred shall not exceed the actual cost of registration or housing fees. No transfer authorized pursuant to this paragraph shall exceed the number of semester credit hours or semesters of dormitory residence contracted on behalf of a qualified beneficiary.

(e) A qualified beneficiary may apply the benefits of an advance payment contract toward an eligible out-of-state college or university. An out-of-state college or university which is not for profit, is accredited by a regional accrediting association, and which confers baccalaureate degrees shall be eligible for such application. The board shall transfer, or cause to have transferred, an amount not to exceed the redemption value of the advance payment contract or the original purchase price plus 5 percent compounded interest, whichever is less, after assessment of a reasonable transfer fee. In the event that the cost of registration or housing fees charged the qualified beneficiary at the eligible out-of-state college or university is less than this calculated amount, the amount transferred shall not exceed the actual cost of registration or housing fees. Any remaining amount shall be

transferred in subsequent semesters until the transfer value is depleted. No transfer authorized pursuant to this paragraph shall exceed the number of semester credit hours or semesters of dormitory residence contracted on behalf of a qualified beneficiary.

(8) The board shall solicit proposals for the operation of the Florida Prepaid Postsecondary Education Expense Program pursuant to § 287.057, through which the board shall contract for the services of a records administrator, a trustee services firm, and one or more product providers.

(a) The records administrator shall be the entity designated by the board to conduct the daily operations of the program on behalf of the board. The goals of the board in selecting a records administrator shall be to provide all purchasers with the most secure, well-diversified, and beneficially administered postsecondary education expense plan possible, to allow all qualified firms interested in providing such services equal consideration, and to provide such services to the state at no cost and to the purchasers at the lowest cost possible. Evaluations of proposals submitted pursuant to this paragraph shall include, but not be limited to, the following criteria:

1. Fees and other costs charged to purchasers that affect account values or operational costs related to the program.

2. Past experience in records administration and current ability to provide timely and accurate service in the areas of records administration, audit and reconciliation, plan communication, participant service, and complaint resolution.

3. Sufficient staff and computer capability for the scope and level of service expected by the board. 4. Financial

history and current financial strength and capital adequacy to provide administrative services required by the board.

(b) The trustee services firm shall be the entity designated by the board to select and supervise investment programs on behalf of the board. The goals of the board in selecting a trustee services firm shall be to obtain the highest standards of professional trustee services, to allow all qualified firms interested in providing such services equal consideration, and to provide such services to the state at no cost and to the purchasers at the lowest cost possible. The trustee services firm shall agree to meet the obligations of the board to qualified beneficiaries if moneys in the fund fail to offset the obligations of the board as a result of imprudent selection or supervision of investment programs by such firm. Evaluations of proposals submitted pursuant to this paragraph shall include, but not be limited to, the following criteria:

1. Adequacy of trustee services for supervision and management of the program, including current operations and staff organization and commitment of management to the proposal.

2. Capability to execute program responsibilities within time and regulatory constraints.

3. Past experience in trustee services and current ability to maintain regular and continuous interactions with the board, records administrator, and product provider.

4. The minimum purchaser participation assumed within the proposal and any additional requirements of purchasers.

5. Adequacy of technical assistance and services proposed for staff.

6. Adequacy of a management system for evaluating and improving overall trustee services to the program.

7. Adequacy of facilities, equipment, and electronic data processing services.

8. Detailed projections of administrative costs, including the amount and type of insurance coverage, and detailed projections of total costs.

(c) 1. The product providers shall be the entities designated by the board to develop investment portfolios on behalf of the board to achieve the purposes of this section. Product providers shall be limited to authorized insurers as defined in § 624.09, banks as defined in § 658.12, associations as defined in § 665.012, authorized Securities and Exchange Commission investment advisers, and investment companies as defined in the Investment Company Act of 1940. All product providers shall have their principal place of business and corporate charter located and registered in the United States. In addition, each product provider shall agree to meet the obligations of the board to qualified beneficiaries if moneys in the fund fail to offset the obligations of the board as a result of imprudent investing by such provider. Each authorized insurer shall evidence superior performance overall on an acceptable level of surety in meeting its obligations to its policyholders and other contractual obligations. Only qualified public depositories approved by the State Insurance Commissioner and Treasurer shall be eligible for board consideration. Each investment company shall provide investment plans as specified within the request for proposals.

2. The goals of the board in selecting a product provider company shall be to provide all purchasers with the most secure, well-diversified, and beneficially administered postsecondary education expense plan possible, to allow all

qualified firms interested in providing such services equal consideration, and to provide such services to the state at no cost and to the purchasers at the lowest cost possible. Evaluations of proposals submitted pursuant to this paragraph shall include, but not be limited to, the following criteria:

a. Fees and other costs charged to purchasers that affect account values or operational costs related to the program.

b. Past and current investment performance, including investment and interest rate history, guaranteed minimum rates of interest, consistency of investment performance, and any terms and conditions under which moneys are held.

c. Past experience and ability to provide timely and accurate service in the areas of records administration, benefit payments, investment management, and complaint resolution.

d. Financial history and current financial strength and capital adequacy to provide products, including operating procedures and other methods of protecting program assets.

(9) The state shall agree to meet the obligations of the board to qualified beneficiaries if moneys in the fund fail to offset the obligations of the board. The Legislature shall appropriate to the Prepaid Postsecondary Education Expense Trust Fund the amount necessary to meet the obligations of the board to qualified beneficiaries.

(10) The assets of the fund shall be maintained, invested, and expended solely for the purposes of this section and shall not be loaned, transferred, or otherwise used by the state for any purpose other than the purposes of this section. This subsection shall not be construed to prohibit the board from investing in, by purchase or otherwise, bonds, notes, or other

obligations of the state or an agency or instrumentality of the state. Unless otherwise specified by the board, assets of the fund shall be expended in the following order of priority:

(a) To make payments to state postsecondary institutions on behalf of qualified beneficiaries.

(b) To make refunds upon termination of advance payment contracts.

(c) To pay the costs of program administration and operations.

(11) Moneys paid into or out of the fund by or on behalf of a purchaser or qualified beneficiary of an advance payment contract made under this section, which contract has not been terminated, are exempt, as provided by § 222.22, from all claims of creditors of the purchaser or the beneficiary.

(12) The state or any state agency, county, municipality, or other political subdivision may, by contract or collective bargaining agreement, agree with any employee to remit payments toward advance payment contracts through payroll deductions made by the appropriate officer or officers of the state, state agency, county, municipality, or political subdivision. Such payments shall be held and administered in accordance with this section.

(13) Nothing in this section shall be construed as a promise or guarantee that a qualified beneficiary will be admitted to a state postsecondary institution or to a particular state postsecondary institution, will be allowed to continue enrollment at a state postsecondary institution after admission, or will be graduated from a state postsecondary institution.

(14) In the event that the state determines the program to be financially infeasible, the state may discontinue the provision of the program. Any qualified beneficiary who has

been accepted by and is enrolled or is within 5 years of enrollment in an eligible independent college or university or state postsecondary institution shall be entitled to exercise the complete benefits for which he or she has contracted. All other contract holders shall receive a refund, pursuant to subparagraph (6) (a) 7., of the amount paid in and an additional amount in the nature of interest at a rate that corresponds, at a minimum, to the prevailing interest rates for savings accounts provided by banks and savings and loan associations.

History:§ 1, ch. 87-132;§ 17, ch. 88-185; s. 2, ch. 88-303;§ 3, ch. 88-313;§ 1, ch. 89-316;§ 1, ch. 90-130;§ 32, ch. 90-268;§ 82, ch. 90-360;§ 18, ch. 91-55;§ 5, ch. 91-429;§ 1, ch. 92-124;§ 1, ch. 93-191;§ 1, ch. 94-200;§ 1, ch. 95-129;§ 831, ch. 95-148;§ 36, ch. 95-392;§ 1, ch. 96-262;§ 103, ch. 96-406.